SUPPLEMENT

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CONTENTS

REPORT

OF

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER

Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1928

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 16, 1929.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1928.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
State House.

Attorney General.

JOSEPH E. WARNER.[1]

(ARTHUR K. READING.[2])

Assistants.

FRANKLIN DELANO PUTNAM.
JOSEPH E. WARNER.[3]
ROGER CLAPP.
CHARLES F. LOVEJOY.
SAMUEL H. LEWIS.[4]
RALPH W. STEARNS.[4]
EMMA FALL SCHOFIELD.
GERALD J. CALLAHAN.
JAMES S. EASTHAM.
R. AMMI CUTTER.
VINCENT J. ZEO.[5]
EDWARD T. SIMONEAU.[6]
STEPHEN D. BACIGALUPO.[6]
GEORGE B. LOURIE.[6]

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

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[1] Chosen by Legislature to fill vacancy June 13, 1928.
[2] Resigned June 6, 1928.
[3] Sworn in as Attorney General June 14, 1928.
[4] Resigned July 14, 1928.
[5] Resigned July 21, 1928.
[6] Appointed August 8, 1928.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1928	$104,000 00
Appropriation for small claims	5,000 00
Publication of opinions of the Attorneys General	5,000 00
Supplemental appropriation	17,000 00
	$131,000 00

Expenditures.

For salary of Attorney General	$7,822 21
For law library	590 38
For salaries of assistants	45,704 04
For clerks	10,528 50
For office stenographers	7,913 89
For telephone operator	1,228 00
For legal and special services	20,307 67
For office expenses and travel	5,034 39
For court expenses	2,136 88
For small claims	2,502 24
Publication of opinions	3,921 15
Total expenditures	$107,689 35

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, Jan. 16, 1929.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1928, to the number of 8,450 are tabulated below:

Corporate franchise tax cases		544
Extradition and interstate rendition		298
Grade crossings, petitions for abolition of		55
Land Court petitions		101
Land-damage cases arising from the taking of land:		
Department of Public Works		64
Metropolitan District Commission		62
Department of Mental Diseases		8
Department of Conservation		1
Department of Public Health		3
Department of Correction		2
Miscellaneous cases		957
Petitions for instructions under inheritance tax laws		55
Public charitable trusts		241
Settlement cases for support of persons in State hospitals		57
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth		5,960
Indictments for murder:		
Disposed of	30	
Now pending	12	42

CAPITAL CASES.

Bristol County. — In charge of District Attorney William C. Crossley:
Disposed of — Napoleon Pelletier and Elmer K. Pierce.
Pending — Henri LeBrun.

Essex County. — In charge of District Attorney William G. Clark:
Disposed of — James Kamanis and Vincent Laurette.
Pending — George Metaxatos and George Elmer Harrison Taylor.

Hampden County. — In charge of District Attorney Charles R. Clason:
Disposed of — Morris Levine.

Hampshire County. — In charge of District Attorney Charles Fairhurst:
Disposed of — Joseph Parent.

Middlesex County. — In charge of District Attorney Robert T. Bushnell.
Disposed of — Abraham M. Ali, Demosthenes Antonopoulos, Paulo Baressi, Joseph Foster Buckley, Jerry Gedzium, Costantino Girardo, Herbert J. Gleason, Clarence R. Hogan, Louis LaCedra, and Pierre Veilleux.
Pending — Frederick Hinman Knowlton, Jr.

Norfolk County. — In charge of District Attorney Winfield M. Wilbar:
Disposed of — Carmine F. Corbi, Stephen Hoppe, John Tartar, Clement Teti, and Guiseppi Truglie.

Suffolk County. — In charge of District Attorney William J. Foley:
Disposed of — Alesandro Diotalevi, Joseph Greco, Whitfield Lovell, William F. O'Donnell, Raoul S. Roberio, and Michael Rocco.
Pending — Gangi Cero, Mary E. Fitzgibbons, Harry Lamb, Walter Perry,[1] Antonio Selvitella, Charles Trippi, and Ung Hong Yeu.

Worcester County. — In charge of District Attorney Charles B. Rugg:
Disposed of — Nathan Desatnick, Charles Graves, and Louis Pasakinski.
Pending — John Kroll.[1]

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[1] Committed to State hospital.

I. THE ADMINISTRATION OF CRIMINAL JUSTICE SUPERVISED BY THE ATTORNEY GENERAL.

The entire burden of the suppression of crime may not be laid upon the judicial machinery of the Commonwealth. Suppression of crime has a multitude of angles, and the district attorney's office is immediately concerned with but a single one of them, namely, prosecution after commission.

The prevention of crime concerns itself with research as to the causes of crime, the bases of supply, the foment of the criminal class; the effect of heredity, environment, poverty, education, religious training, and, last but not least, the attitude of the community toward crime and the criminal. These are sociological fields.

Detection and apprehension of crime primarily lie with the police arm. The betterment and development of crime detection, through adoption of scientific methods, and of all apprehension service, through co-operation, lies with the police forces. In this respect the State and Metropolitan Police commendably exemplify progressive and constructive systematization. Efficiency of local municipal departments presumes a certain degree of sovereign unification, which local pride can ill afford to overlook, as the common need is that of a commonwealth.

Correction of crime and of the criminal is a penal problem. Schools of thought reach various conclusions as to modes of its accomplishment. One group contends that incarceration effects no reform; does not serve as a deterrent; that it is a barbaric survival of revenge, and, engendering an "anti-social" attitude, hardens the very offender. Another group contends that, without incarceration, there is little stigma; that mere money penalty ill suffices. Still another group contends that the criminal is merely mentally diseased and should be treated, and, possibly, restored to health through mental hospitalization. Still another group contends that inflexible severity yields the only suitable remedy as a stern and forbidding spectre against the commission of all crime. Another asserts that the greater the severity the less the likelihood of conviction by a jury. Still another group contends that there should be a Procrustean standardization of penal punishment applicable irrespective of condition or circumstance. In juxtaposition to this latter group still another contends that power of individualization by the court for tempering justice with mercy should be paramount and absolute.

I cite this diversity of opinion on the part of that element of the

public studiously inclined to offer a solution of this one aspect of crime suppression alone, while vociferous call is addressed to prosecuting officers to stamp out crime. It is apparent that results may not be obtained through casual or spasmodic opinions or isolated cases. Time alone, enabling legislation chastened by the wisdom of the most profound public sentiment, based upon intensive and comprehensive study of all phases, may effect cures harmonious to the body politic.

The present obstacle to speedy prosecution is the congestion of cases listed for trial. The Judicial Council, after mature deliberation, has submitted certain findings well worthy of consideration. In some of these recommendations I concur, to wit:

1. For the avoidance of delay in the execution of sentences in capital cases, by the saving of exceptions at hearings on motions for new trial and repeated recourse to the Supreme Judicial Court; the recommendation for the broadening of the functions of the Supreme Judicial Court on appeals so that it may pass upon the whole case, order new trial if interest of justice requires, and stay execution of any imposed sentence of death pending final determination of any judicial question. (3d Rep., p. 77.)

2. For the relief of congestion of jury trial cases of persons under indictment for crime, the recommendation for voluntary waiving by the accused of jury trial in other than capital cases. (1st Rep., p. 21.)

3. For the relief of congestion of criminal cases in the district courts, the recommendation for the elimination of court appearances of offenders in certain petty motor vehicle offenses. (4th Rep., p. 37.)

Recommendations of District Attorneys.

The recommendations of district attorneys, in which I concur, are as follows:

1. That duration of the provisions of St. 1923, c. 469, as amended by St. 1928, c. 353, for disposition of certain criminal cases by judges of district courts sitting in the Superior Court be extended to December 31, 1930.

2. That the cases, in the trial and disposition of which district court judges sitting in the Superior Court have powers and duties of the judges of the Superior Court, include all cases within the criminal jurisdiction of the district courts. St. 1923, c. 469, § 1, as amended by St. 1924, c. 485, § 1, restricts the jurisdiction of district court judges sitting in the Superior Court to "any misdemeanors except conspiracy or libel;" whereas G. L., c. 218, § 26, defining the original jurisdiction of the district court judges, includes "felonies punishable in the state

prison for not more than five years." It seems inconsistent to preclude a judge of the district court sitting in the Superior Court from jurisdiction of cases over which he has power to make final disposition in his own court concurrent with the Superior Court. As it is now, prosecutions for violation of G. L., c. 272, §§ 7, 14, 24, or proceedings for forfeiture, may not be had by district attorneys before district court judges sitting in the Superior Court.

3. That district court judges sitting in the Superior Court have power of the Superior Court judges in all cases of forfeiture.

District court judges sitting in the Superior Court now have power to decree forfeitures of the value of the property not exceeding $1,000 (G. L., c. 256, §§ 3, 7; c. 218, § 19). There seems to be no good reason to preclude district court judges from hearing and disposing of all forfeitures, for the reason that such courts, hearing the violation of the law whereby property was seized, could make decisions appropriately as to the forfeitures regardless of the value.

4. That in recovery on recognizance district attorneys may sue and bid in real estate for the county.

5. That St. 1928, c. 333, relative to commitment of defective delinquents and drug addicts, be amended. This act, amending G. L., c. 123, § 113, as amended by St. 1921, c. 270, and St. 1922, c. 535, § 7, provides for application by a district attorney for commitment as a defective delinquent of a defendant committable to State prison, reformatory, etc., for any offense "not punishable by death or imprisonment for life." There are many offenses punishable by life imprisonment other than murder in the second degree. The district attorneys believe that the benefits of this chapter, if not extended to all offenses punishable by life imprisonment, should be extended to offenses other than murder in the second degree.

6. Abolishing the crime of accessory before the fact; that G. L., c. 274, §§ 2 and 3, be repealed, and that there be substituted therefor a short section making accessories before the fact triable and punishable as principal felons.

7. That the penalty for larceny be increased. The maximum penalty today for larceny of any sums in excess of $100, whether $101 or $1,001, is five years in State Prison. There should be a heavier penalty for larceny of larger sums.

8. That in bail cases, where real estate is surety, a certificate be recorded in the registry of deeds creating a lien on the same.

9. That G. L., c. 12, be amended, enabling district attorneys to secure advance moneys for travel and expenses outside of the

State. Expedition in securing evidence and return of fugitives would thereby be facilitated.

10. That, in criminal cases, if no agreement is reached by a jury before nine o'clock in the evening, the court may permit suspension of deliberations and provide suitable accommodations for the jury for the night.

By reason of doubt as to jurisdiction in automobile cases, trial justices hold offenders for the grand jury, thus necessitating indictment and the loss of time of a district attorney for more important cases. Consideration of clarification of their jurisdiction by specific inclusion of automobile offenses is suggested.

A professional bondsman is defined in G. L., c. 276, § 61B (inserted by St. 1921, c. 465, § 2, amended by St. 1926, c. 340, § 1), as "any person becoming bail or surety in a criminal case after having become bail or surety in criminal cases on more than three separate occasions in any twelve months' period." Surety companies are excepted. A probation officer in the Superior Court or district court may come within this description. The appointment of probation officers as sureties for bail is of aid to the courts, as well as to the community, for control of persons pending trial and disposition. I recommend that probation officers be also excepted.

II. ADMINISTRATION OF CIVIL BUSINESS CONDUCTED BY THE ATTORNEY GENERAL.

Cases of Interest wherein the Attorney General appears for the Commonwealth.

A. CASES PENDING NOVEMBER 30, 1928.

(*a*) Interstate Controversy.

Connecticut v. Massachusetts.

St. 1926, c. 375, and St. 1927, c. 321, authorized the diversion of a portion of the waters of the Swift and Ware rivers from the watershed of the Connecticut River for the purpose of providing a water supply for the Metropolitan District, and authorized the Metropolitan District Water Supply Commission, created thereby, to expend a sum not to exceed $65,000,000.

The supply of good water for the city of Boston and surrounding communities is not adequate, and unless it is augmented a very serious and acute shortage will result in the near future. The effect of the diversion is to abstract from the Connecticut River watershed a small quantity of water which otherwise would flow into that river through our own Commonwealth and thence into Connecticut.

The State of Connecticut, alleging that the flow of the river will be so diminished by the diversion as to cause injury to that State and to the citizens thereof, instituted suit against this Commonwealth in the Supreme Court of the United States, seeking to enjoin the diversion. An answer was filed by this Commonwealth and the case is now pending in court.

Bentley W. Warren, Esq., was appointed Special Assistant Attorney General to conduct the case for the Commonwealth of Massachusetts, and is being assisted by two of the regular Assistant Attorneys General. The issues of law and of fact are complicated and detailed. It is sufficient, however, to state that the interests of this Commonwealth in this case are of the greatest consequence and are being carefully and fully protected.

(*b*) Rate Cases.

1. *Electric Light Rates.*

Rates for electric lighting as fixed by the Department of Public Utilities have been attacked as confiscatory. Sherman L. Whipple, Esq., was appointed a Special Assistant Attorney General to conduct the trial of these cases in support of the rates so fixed.

In the first of the cases, brought by the Worcester Electric Light Company, the evidence presented before a special master has been closed, and the case awaits the filing of his report.

In the second case, brought by the Cambridge Electric Light Company, hearings before a master are now in progress.

2. *Automobile Compulsory Insurance Rate Cases.*

Owing to the resignation of the Commissioner of Insurance on September 1, 1928, litigation resulted as to what, if any, rates for such insurance were to apply for the year 1929. Various proceedings were brought to try out this question and were argued on behalf of the Acting Commissioner of Insurance by this Department before the Full Bench of the Supreme Judicial Court. The decision of the court resulted in a set of rates being promulgated in November by the then Acting Commissioner. Various petitions for review of these rates as they have been established are now pending in the Supreme Judicial Court.

(*c*) Billboard Cases.

The billboard litigation is a consolidation of various bills in equity brought by the General Outdoor Advertising Company, Inc., and nineteen other outdoor advertising companies in Massachusetts against the

Commissioners of Public Works. The case involving the Chevrolet sign on Beacon Hill was added to the billboard cases in 1927. These cases are being heard before a master, and the complainants' case has been practically completed. The record is assuming large proportions, there being to date 4,724 pages of transcript of evidence, with over 1,300 exhibits.

(*d*) Tax Cases.

There are now pending in the Supreme Judicial Court two important questions affecting taxation:

(1) Whether a receipt in full given by the Commissioner of Corporations and Taxation prevents the Commissioner from later making an additional assessment where the net estate of a Massachusetts decedent is increased, due to a rebate of a Federal estate tax previously allowed as a deduction by the Commissioner in computing the Massachusetts inheritance tax; and

(2) The constitutionality of the Massachusetts succession tax in its application to a trust *inter vivos*, executed before the enactment of the taxing statute, where the trust is to take effect in possession or enjoyment after death.

B. CASES DECIDED DURING THE YEAR.

1. In the Supreme Court of the United States.

(*a*) *Tax Cases.*

During the past year the Supreme Court of the United States has on three occasions considered questions argued by this Department involving the constitutionality of tax statutes of this Commonwealth or of the application of those statutes in particular instances.

In *Saltonstall* v. *Saltonstall*, decided February 20, 1928, the Supreme Court affirmed the decision of the Supreme Judicial Court of Massachusetts reported in 256 Mass. 519, wherein it was held that the tax authorized by the Massachusetts legacy tax statute is an excise tax upon the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property, and that the tax could be imposed upon an interest accruing to beneficiaries after the enactment of the tax statute upon an interest created by a revocable trust indenture executed prior to the passage of the tax statute.

Long v. *Rockwood*, decided May 14, 1928, affirmed the decision of the Supreme Judicial Court in the case of *Rockwood* v. *Commissioner of Corporations*, 257 Mass. 572. In that case the Commissioner of Corporations and Taxation had taxed income in the nature of patent

royalties received by the complainant, a resident of the Commonwealth. The complainant paid the tax and successfully sued to recover it, contending that income received in the form of royalties for the use of patents issued to him by the United States was not taxable inasmuch as it was income from a Federal instrumentality. Four justices dissented.

National Leather Co. v. *Massachusetts*, decided May 28, 1928, upheld an excise tax assessed, under the provisions of G. L., c. 63, upon a foreign corporation for the privilege of carrying on business in Massachusetts, and held that the Commissioner of Corporations and Taxation properly included, in computing the "corporate excess employed within the Commonwealth" certain shares owned by the taxpayer corporation in other foreign corporations also doing business in Massachusetts. As a result of this favorable decision the validity of a very large number of taxes under the present corporation excise statute has been assured.

2. In the Supreme Judicial Court.

(*a*) *Tax Cases.*

There have also been several important tax decisions rendered by the Supreme Judicial Court. The provisions of our income tax law with respect to the taxation of certain dividends in liquidation of foreign corporations were construed favorably to the contentions of the Commonwealth in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Corporations and Taxation*, 1928 Adv. Sh., p. 123.

In *Whipple* v. *Commissioner of Corporations and Taxation*, it was held that, upon the facts set forth in that case, losses incurred in the operation of a farm, conducted in a manner found by the trial court to be businesslike, might be deducted from business income under the Massachusetts income tax statute (G. L., c. 62, §§ 5, 6).

The case of *Macallen Co.* v. *Commonwealth* upheld the validity of the net income measure of the corporate excise imposed under G. L., c. 63, § 32 and § 30 (as amended by St. 1925, c. 353, § 1A). Under that act income received by domestic corporations from Federal government bonds is included as a portion of the gross income of such corporations for the purpose of computing net income within the meaning of the act. This holding that the 1925 amendment of our corporation excise statute is constitutional will, if upheld by the Supreme Court of the United States, result in continuing the more equitable distribution of the burden of the corporation excise intended when that amendment was passed. An appeal has been taken by the taxpayer to the

Supreme Court of the United States, which will probably be argued some time in the spring.

The validity of the minimum excise tax upon domestic business corporations whose profits are derived principally from the manufacture, ownership, or use of real estate or tangible personal property, was upheld by the Supreme Judicial Court in *Essex Theatres Co.* v. *Commonwealth.*

(*b*) *The "Padlock" Case.*

Under the provisions of St. 1928, c. 125, equity proceedings, seeking to close certain premises by permanent injunction, were initiated in the Superior Court for Middlesex County. The district attorney for the Northern District, Mr. Bushnell, with commendable energy, proceeded to take advantage of the provisions of this new act shortly after it became effective, but, before the hearing could be had, the owner of the premises, which the district attorney sought to close, filed a petition for a writ of prohibition, seeking to prevent the Justices of the Superior Court from hearing the petitions on the ground that St. 1928, c. 185, was unconstitutional. The Department appeared for the Justices. On dismissal of the petition, the owner of the premises took the case to the Full Bench of the Supreme Judicial Court upon a bill of exceptions. The exceptions were overruled, the court holding that the statute was in all respects constitutional. *Reale* v. *Judges of the Superior Court*, 1928, Adv. Sh. 1917.

A decision upholding the constitutionality of the Padlock Law so soon after its passage is exceedingly helpful. It makes the application of the law easier and tends to prevent frivolous appeals on constitutional grounds.

At page 1921, however, Mr. Justice Pierce uses the following language:

> One part of a building may be used in such manner as to make it a nuisance without affecting the legal character of the other part. *Commonwealth* v. *Donovan*, 16 Gray, 18. A legal variance would result if an indictment charged the keeping of a certain building for the illegal sale and illegal keeping of intoxicating liquor, if the proof was that one of several tenants in the same building occupied and kept that tenement for that purpose. *Commonwealth* v. *McCaughey*, 9 Gray, 296. And a like rule is applicable to proceedings under said § 16A.

From this and other language of the court, it is arguable that section 16A authorizes a judge sitting in equity to "padlock" only such portions of a building as may be shown to be used for the *sale* of intoxicating liquor, if the evidence does not go to the extent of proving either (*a*) that the whole building was used and occupied by the person main-

taining the nuisance, or (*b*) that the whole building constituted a nuisance because all of it was used for the sale of intoxicating liquor; and that, consequently, though one portion of the building be padlocked, the keeper of the nuisance may at once proceed to use another portion of the building for illegal purposes. Without passing on the question whether such a narrow construction of section 16A would be taken by a court, the act might appropriately be amended in order that no doubt may exist as to power of the court.

III. DEPARTMENTAL SERVICES.

1. Settlement of Small Claims against the Commonwealth.

Since the period covered by my predecessor's last annual report 28 claims have been presented against the Commonwealth under St. 1924, c. 395.

18 were approved, with a total expenditure of $2,045.
3 were referred to the Legislature under the terms of the statute.
4 were rejected.
2 were withdrawn by the claimants.
1 is still pending.

Sixty per cent of these claims was for damages occasioned by the operation of State automobiles.

2. Petitions for Abolition of Grade Crossings.

The State, the city or town, and the railroad company are jointly interested in the abolition of the grade crossing, — menace to life and limb and thief of time. The burden of expense is borne only in part by the railroad and by the locality, 10 to 30 per cent coming from the State.

Today an abolition is a local problem, and its success is dependent upon local zeal irrespective of the part it plays in the general scheme, either from the standpoint of traffic or the burden of general taxation. Plans, both old and new, are being projected, now that the effect of war conditions upon finance of the railroads — primary cause for deferring action — is diminishing. Of the $5,000,000 authorized to be expended by the Commonwealth for the abolition of grade crossings under the provisions of St. 1906, c. 463, § 42, approximately only $435,000 is unapplied and available for projects already initiated or proposed. The broad provisions for comprehensive survey by the Department of Public Works for State highway construction worked successfully.

It might be well to have each proposition of abolition submitted to the Department of Public Works as well as to the Department of Public Utilities for its report or approval, so that it may square with a general scheme of development for the general benefit.

3. Interstate Rendition and Extradition.

After the Governor of this Commonwealth has granted the request of a Governor of another State for the rendition of an alleged fugitive from justice, and has issued a warrant calling for such rendition, it occasionally happens that, solely for the purpose of delaying the trial of the criminal prosecution for which the fugitive is wanted in another State, a petition for a writ of habeas corpus is filed by the alleged fugitive in the Supreme Judicial Court raising issues of fact and law which have already been carefully considered by the Governor or by this Department under the authority of G. L., c. 276, § 12. A hearing upon such a writ may be had with reasonable promptness before a single justice of the Supreme Judicial Court. If, however, the case is taken to the Full Court upon report or for review in some other manner, a very considerable time may elapse before the Full Court renders its opinion. Inasmuch as a Federal question is frequently involved in such cases, resort may be had, even after the opinion of the Full Court, either to the Supreme Court of the United States by appeal, or by the filing of another writ of habeas corpus in the Federal District Court. It thus may happen that an undue time may pass between the arrest of the fugitive and his rendition to a sister State seeking to prosecute him for some serious offense within that jurisdiction. In my opinion, provision should be made by amendment of G. L., c. 276, § 14, and by amendment of the pertinent sections of G. L., c. 248, so that review of the decision of the single justice as to whether or not a writ of habeas corpus should be granted should be given by the Full Court more expeditiously than is possible at present. One method of expediting such hearings before the Full Court would permit argument of report or exceptions upon typed record in manner similar to that now provided for capital cases and other felonies by St. 1925, c. 279, and St. 1926, c. 329. In any event, provision should be made for the advancement of such cases upon the docket of the Full Court on the same basis as criminal appeals. The Supreme Judicial Court, in the absence of such provision in the statutes, has on at least one occasion made an order advancing such a case as a matter of discretion.

Presumably a fugitive will receive a fair trial before a properly con-

stituted judicial body in the demanding State, and that trial, in the interest of justice, should not be delayed unduly by dilatory proceedings in the courts of this Commonwealth.

I suggest that this matter be referred to the Judicial Council for consideration and recommendation.

4. Matters Concerning Public Administration.

During the past year the Department has kept in close touch with public administrators handling estates throughout the Commonwealth, in which estates this Department might, either on its own account or on behalf of the Treasurer and Receiver General, have an interest by way of possible escheat of the assets of the estate, or otherwise.

These administrators are frequently placed in the position of passing upon claims against the estate made by persons who have referred the estate for administration to the public administrator. Perhaps a system of rotation could be worked out, involving reference by the court of estates to administrators, assuring all administrators in a county of an equal share and relieving them from embarrassment in passing on claims presented against an estate by the very person giving them the case. The situation is one difficult to reach directly by legislation. Regulation may be effected through extension of rule-making powers of the Probate Court.

There is some evidence of a growing practice by attorneys, other than public administrators, of conducting searches for heirs in large estates in which administration has already been taken out by public administrators. Upon the discovery of heirs, or alleged heirs, the attorney conducting this search then petitions, in his own name or in the name of some nominee, for administration in behalf of the alleged heirs. Under the present statute (G. L., c. 194, § 7) no notice need be given to the public administrator who has already been appointed, to the Treasurer and Receiver General, or to the Attorney General, all of whom are certainly persons interested, for one reason or another, in the administration of the estate.

I recommend that notice of petitions by alleged heirs to the public administrator concerned and to the Treasurer and Receiver General be required, and that it be made discretionary with the Probate Court to permit the public administrator already handling the estate to continue to do so if such continuance of service would best meet the public interest and the welfare of the estate.

The alleged heirs in such instances are almost invariably persons of small means, frequently residing abroad and ignorant of our laws.

Upon giving some Massachusetts attorney a power of attorney to handle the administration for them, they usually are not aware of the fact that taking the administration out of the hands of the public administrator will result in financial loss to them. Usually there is no gain to the public or to the alleged heir in having the estate removed from the hands of the public administrator. The gentlemen now occupying the positions of public administrators throughout the Commonwealth are fitted to handle these estates to the advantage of all concerned, and may well be permitted, subject to judicial discretion, to complete the administration of estates in which they have been appointed as fiduciaries where the interest of the state and of the public will be thereby served. Moreover, the authenticity of some such claims of heirship is exceedingly doubtful. I suggest a provision calling for investigation by the public administrator of all claims in which the probate court may find there is reasonable cause to believe that the claimant is not in fact an heir of the decedent. To prevent fraudulent claims of heirship by non-residents in cases where public administration has not been taken out prior to the bringing of a petition in behalf of the alleged heirs, provision should be made for notice in writing to the Treasurer and Receiver General of the pendency of all petitions for administration brought by an alleged widow, surviving husband or next of kin not resident within the Commonwealth.

5. Supervision of Charitable Trusts.

This has involved the examination of all petitions in Massachusetts courts relative to the application of the *cy-pres* doctrine to charitable bequests; of all petitions by charities for permission to sell property subject to a trust; to dissolve and transfer assets to another corporation upon the same charitable purposes; examination of accounts of trustees; rendition of assistance to the court in the matter of appointment of new trustees for charitable purposes; participation in litigation affecting any bequests to Massachusetts charities.

6. Proceedings in the Nature of Quo Warranto.

Of the many petitions the one affecting the greatest number of persons was that brought at the relation of the Acting Commissioner of Insurance under the provisions of G. L., c. 175, § 6, as amended, against the Car Owners Mutual Liability Insurance Company, as to which the Acting Commissioner was satisfied that its condition was one of insolvency. The matter was promptly heard in the Supreme Judicial Court,

and after a report by a master a permanent injunction was issued restraining the company from doing business, and receivers were appointed to settle its affairs and to protect the interests of its 40,000 policy holders and of its numerous creditors.

7. Appearance in Industrial Accident Cases and Approval of Contracts and Titles.

The Department has represented the Commonwealth at 21 hearings before the Industrial Accident Board and at 8 conferences in cases arising under the Workmen's Compensation Act (G. L., c. 152), providing for compensation to laborers, workmen and mechanics, as well as foremen, subforemen and inspectors, employed by the Commonwealth, who receive personal injuries arising out of and in the course of their employment.

The Department also prepared or passed upon 461 contracts as to form; and 25 leases, 3 easements and 115 deeds as to legal form and title.

Of proceedings against the Commonwealth under the provisions of G. L., c. 258, there are pending 15 in contract.

8. Special Reports to the Legislature.

As to Release by the Commonwealth of Restrictions on Newbury Street, Boston.

Of several reports rendered by the Department, that most immediately affecting the Commonwealth relates to the advisability of a release by the Commonwealth of its interest in certain restrictions, which restrictions might tend to prevent the widening by the city of Boston of Newbury Street. A public hearing was held thereon, and after due consideration, this Department recommended that no steps be taken by the Commonwealth at this time to release its interests in such restrictions. The Back Bay district, as laid out by the Commonwealth of Massachusetts in about 1850, was originally intended as a highly desirable residential district, and any move at this time on the part of the Commonwealth which would in any way detract from the desirability of that district for such purposes is deemed unwise and ill-timed.

9. Opinions of the Attorney General.

Opinions which may be of interest are annexed to the Report.

10. Federal Relations.

The Act of Congress of March 28, 1928, declared that "the people of all the zones," established by the Radio Act of 1927, "are entitled to equality of radio broadcasting service," and directed the Federal Radio Commission to make "a fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone, according to population." The Attorney General appeared before the Commission at Washington in opposition to an assignment of reduced wave length to station WNAC, which assignment, by reason of practical loss of service of such station through reduction, appeared to be discriminatory to the people and to the State. The Attorney General co-operated with the Attorney General of New York in opposition to an assignment of curtailed operating time to station WGY in New York State, serving the people of our western counties.

IV. GENERAL OBSERVATIONS.

1. Authority of the Attorney General to Settle Cases.

I recommend that legislation be enacted empowering the Attorney General to settle all cases actually entered in court upon whatever terms may seem to him most advantageous to the Commonwealth. Considerable doubt exists at present as to the extent of his authority in this respect.

2. Fixation of Definite Time for Enforcing Claims for Labor and Materials on Public Works Constructed by the Commonwealth and by Counties, Cities and Towns, and Harmonization of Law relating to Claims for Labor and Materials on Public Works Constructed by Counties, Cities and Towns, with that of the Commonwealth.

In order to prevent the tying up of money of the contractor held by the Commonwealth, and because of the inability of the Commonwealth to close its accounts as a result of non-enforcement of claims filed by claimants, and in order to prevent similar consequences to counties, cities and towns from non-enforcement of claims against contracts, I recommend an amendment to G. L., c. 30, § 39, as amended by St. 1922, c. 416 (relating to the filing of claims against contracts for public works being constructed or repaired by the Commonwealth), and an amendment to G. L., c. 149, § 29 (relating to the filing of claims against public works contracts of counties, cities and towns), so that a definite time (six months) may be stipulated within which the claimants must bring a petition in equity to enforce their claims or intervene in a peti-

tion already filed. G. L., c. 30, § 39, also provides that claimants shall file claims within sixty days after "the completion of the work," whereas G. L., c. 149, § 29, provides that claimants shall file their claims within sixty days after "*the last day the claimant ceases to perform labor or to furnish labor and materials.*" I recommend that G. L., c. 30, § 39, be further so amended. St. 1922, c. 416, provided that claims may be filed for "*materials employed*" in the construction or repairing of public works as well as for "*materials used.*" There was, however, no similar amendment of G. L., c. 149, § 29, relating to claims filed under county, city or town contracts. I recommend, therefore, such an amendment.

3. Clarification and Unification of all Proceedings relating to Children and Domestic Relations.

As it is now, the district court, municipal court, superior civil court, superior criminal court and probate court may make findings and decrees relating to the same matters. A case of a neglected child is civil; the complaint against its parents, however, is criminal; and the adjudications, on appeal, may be contrary.

A woman deserted by her husband, needing separation or support for herself and her children, now alternates between the criminal courts and the probate court. I stress the urgency for unification of all domestic relation proceedings under a single jurisdiction.

I concur in the recommendation of the Judicial Council that private conversations between husband and wife in cases of domestic relations be admitted. (2d Rep., p. 116.)

Revision of statutes relating to or affecting the welfare and protection of children should be made. Provisions for social investigation of all petitions for adoption; for jurisdiction and supervision by the Department of Public Welfare of all illegitimate children for the establishment of paternity and obtainment of security for support; and supervision of certain others to sixteen years of age, might well be considered.

For the preparation of subsequent legislation, I recommend the appointment of a commission which shall make a thorough study of all these matters.

4. Clarification of Laws relating to Plumbing.

The provision of G. L., c. 142, dealing with the supervision of plumbing, give rise to controversy. They do not have general application throughout the entire Commonwealth. A new examination is manda-

tory on failure to apply for renewal of license on or before May 1. There is uncertainty as to the right of a corporation and partnership legally to engage in the plumbing business. The practice with respect to granting permits to master and journeymen plumbers in cities and towns is not uniform. I recommend study by such commission or board as the General Court may designate for report and recommendations.

5. Recording Automobile Conditional Sales to Avoid Futile Litigation.

I recommend that legislation be enacted requiring that conditional sales of motor vehicles be recorded with the registrar of motor vehicles. It is impossible at the present time to ascertain whether or not a motor vehicle is held on a conditional sale, and great inconvenience and considerable litigation result from disputes with reference to ownership, sales, attachments and liens. The expense in the handling of such recording would be small and could be amply covered by requiring a small recording fee. The result would be that any person interested could find in one central office information which would minimize to a very considerable degree unnecessary loss and litigation.

6. Penalty for Killing Fowl by Poison.

G. L., c. 131, § 58, as amended by St. 1923, c. 99, § 3, and St. 1925, c. 334, penalizes the killing, by poisoning, of a "quadruped" only. Thus the owners of hens, geese and ducks are not protected. I recommend extension of these provisions to include fowl as well as quadrupeds.

7. Date of Meeting of Presidential Electors.

The Congress of the United States, by the act of May 29, 1928, c. 859, § 1, 45 Stat., provided that —

> The electors of president and vice-president of each state shall meet and give their votes on the first Wednesday in January next following their appointment at such place in each state as the legislature of such state shall direct.

This statute is inconsistent with G. L., c. 54, § 148, which provides that —

> The persons chosen as presidential electors shall meet at the state house on the Saturday preceding the second Monday in January succeeding their election.

While the manner of choosing, electing or appointing electors of President and Vice-President is left for the several States to prescribe,

yet the Congress of the United States has ample power to prescribe the day on which those electors shall in their several States meet and vote.

Therefore, I recommend that our State statute be made to conform to the Act of Congress by striking out in the first sentence of G. L., c. 54, § 148, the words "Saturday preceding the second Monday" and inserting in place thereof the words "first Wednesday."

8. Literary and Dramatic Censorship.

There has been adverse criticism throughout the country of the methods in Massachusetts of censoring literary and dramatic productions. The effective control of such productions rests either in those local authorities who license theatrical productions, or in such public-spirited citizens as may seek to curb the sale of books which offend them, by criminal prosecution of book sellers.

The pertinent statutes *with respect to theatrical productions* are G. L., c. 140, § 181, § 182, as amended by St. 1926, c. 299, § 2, § 182A, §§ 183A–C, §§ 185A–G, dealing generally with the licensing of theatrical performances by the local authorities; G. L., c. 143, §§ 35–38, and § 52, dealing with the inspection and regulation of buildings used for theatrical entertainments (pertinent here because revocation of licenses to use buildings as theatres has been used as a method of preventing theatrical exhibitions which the local authorities have not desired to prevent by the direct means provided under chapter 140); and G. L., c. 272, § 32, making it a criminal offense to participate in, or aid in, the production of an obscene or offensive theatrical performance or exhibition.

With respect to books, — G. L., c. 272, § 28, making the sale, printing or distribution of matter containing obscene, indecent, or impure language a criminal offense, is the controlling statute. At the last session of the General Court three bills were introduced looking to the amendment of the last-named section. (See 1928 House Documents Nos. 59, 577 and 680.) All of these bills were referred to the Committee on Legal Affairs, which reported "leave to withdraw" (House Journal (1928) 522), which report was accepted (House Journal (1928) 534, 541).

Regulation of the sale of objectionable books is, therefore, left to the criminal law and to the preventive effect of threat of prosecution; regulation of dramatic production, to the action of local authorities principally. A theatrical producer or a publisher has no way of discovering in advance whether performance or book will meet any local standard of propriety. A book seller must either remove a questionable

book from his shelves or deliberately make a sale, for which he knows he will be prosecuted, in the hope of an acquittal. Even acquittal of the particular sale prosecuted is no assurance of acquittal on a prosecution for subsequent sale heard by a different judge or in a different court. On the other hand, books and plays, in fact equally or more questionable, may be sold, or produced, failing disapproval or notice of action of subordinate local authorities, through inadvertence, lack of appreciation, or otherwise. It is obvious that this system leaves a matter which seriously affects the whole community to private enterprise and haphazard and spasmodic public prosecution, resulting in the inconsistency of contemporaneous suppression in one locality and sanction in another. There are many groups interested in any new legislation on these subjects, which affect the press, publishers, librarians, authors, theatrical producers, the clergy, persons engaged in education, labor and the legal profession, among others. An unpaid commission representing all of these groups, the duty of which would be to study the situation and report to the Legislature, might well frame a sound and satisfactory scheme for a more rational censorship.

9. Procedural Changes.

I concur in the recommendation of the Judicial Council for revision of the form of the writ and summons that its content may be as intelligible to the layman as to the lawyer (2d Rep., pp. 37, 112), and for the elimination of the fiction of the chip attachment (2d Rep., pp. 43, 113).

To facilitate determination of cases by avoidance of delay of counsel as to agreement on condensed narrative of transcript of evidence, I concur in the recommendations enabling recitation of evidence in bills of exceptions in question and answer form (2d Rep., p. 35).

To relieve congestion in the Superior Court, I concur in its recommendation of increase in the jurisdiction and limits of the district courts in civil cases (1st Rep., p. 47), and that cases growing out of the same accident, when brought in different counties, may be transferred to be tried together (4th Rep., p. 43).

10. Automobile Litigation.

The administrative problem affecting the Superior Court jury trials is the congestion of civil and criminal cases. Congestion in the civil jury list seems to arise from automobile cases clogging the list, to the prejudice of other causes. The automobile and its laws are account-

able for the inevitably increasing class of such causes. Relief must be had either by the use of other agencies for determination of this class of causes or by shifting other burdens from the Superior Court and discouraging needless litigation. Much can be done in supplemental relief by the State, or cities and towns, through traffic commissions and public improvements, and by organizations genuinely engaged in the promotion of the public safety, for the prevention of accidents.

The valuable analysis of the Judicial Council suggests various possible forms of relief.

11. Alleged Fraudulent Practices of Attorneys and Physicians in Automobile Compulsory Insurance Cases.

Early in 1928 the then Commissioner of Insurance stated publicly that he was informed that fraud in automobile compulsory insurance claims existed which necessarily had a very serious relation to the cost of liability rates. It was eminently proper that the law officer of the Commonwealth should examine the premises which would support so grave a charge, and to that end I conferred with the Commissioner before and since his resignation, and also with such parties as I had reason to believe might have special knowledge of the alleged fraudulent practices. A very determined effort was made on my part to secure evidence upon which the above public statements were based. But not only was no evidence submitted by or subsequently obtainable from the aforesaid Commissioner, but even the "leads" suggested were of no immediate value. Anxious as I was to correct such abuses if they existed, I was presented with only the flimsiest of hearsay to support the statements made by him.

Yet this same vague allegation has focused the attention of this Department upon the possibility of irregularity. The investigation is not completed, and must of necessity take a considerable time. If violation of the law is disclosed, prosecution will follow. But indictment or complaint will not be made until there is dependable evidence. The investigation involves an examination into all the facts of hundreds of accident cases. It has, however, proceeded sufficiently far to make it apparent to me that there is no occasion to initiate or to attempt to initiate any general inquiry into the conduct of the bar of this Commonwealth, such as was conducted in New York and in other cities. I am of the opinion that disciplinary action toward such attorneys as may be disclosed to have committed fraudulent practices can be initiated in the courts in the customary manner rather than through a wholesale investigation of the bar. It would be a great aid to the

investigation which I am making if additional power were given to the Department of the Attorney General, as requested in the following paragraph.

12. Power of the Attorney General Relative to Investigations.

The obligation is generally attributed to the Department of the Attorney General to conduct investigation of matters concerning the public peace, public safety and the public welfare, if at any time it appears to him that the laws are being violated. At present, however, he has no power in any independent inquiry to summon witnesses and to examine them under oath. He should have that power, subject to the same provisions, respecting the obligation of a witness to testify and the right of a witness to refuse to testify, which govern the giving of testimony in the courts of the Commonwealth. Obviously, no exhaustive investigation designed to remedy any arising or existing evils can be conducted by the Attorney General unless he has such power. I recommend enabling legislation.

13. Unprofessional Practices by Attorneys.

There are approximately 7,000 attorneys in Massachusetts. The profession has gained popularity as a calling during the past generation, about 400 becoming eligible thereto annually. Virtually the principal qualification is the passing of the examination established by the Board of Bar Examiners. It is doubtful if any other standard is workable. In the large membership of the bar, not unlike other professions, or even trades, there is an irresponsible element. While, to be sure, this element is but a fraction of the whole, it appears to be increasing. The fraud and misconduct of this minority gravely reflects upon the general reputation of the whole bar, and indirectly lessens the public respect for the judicial system. Necessary house cleaning should be the concern of the various organizations of the bar throughout the State. If work of this nature is not commenced, and pushed to conclusion, and decent amelioration supplied, it is not unlikely that that portion of the public which has been defrauded and imposed upon may demand and obtain some drastic relief not wholly just to the great reputable majority. For the present it seems better to leave the voluntary cure of the malignant ulcers with the various bar associations.

14. Qualifications for Admission to the Bar.

The ground of complaint against the unscrupulous minority of the Massachusetts bar does not come from any cultural deficiencies, but

from basic unmorality. Until this basic lack of morality is supplied, no requirement of qualification by culture will afford a guarantee of rectitude. Education, however exalted, does not fulfill its mission unless it inculcates an unadulterated respect for the fundamental law and government of our country. Ill equipped, indeed, is that student, though he be rich with degrees, who leaves his alma mater poor from lack of respect for the Constitution which, under his oath as a member of the bar, he must swear to honor and uphold. (G. L., c. 221, § 38.) The inculcation of old-fashioned ethics, from early childhood on, will do a great deal to endow the bar of the future with that high regard in which the profession was held by the generation passing away.

15. Disbarment of Attorneys.

There has been widespread public dissatisfaction with the present procedure of disbarment of attorneys. The present law provides that an attorney may be removed by the Supreme Judicial or the Superior Court, and that whenever a petition is filed for the removal of an attorney the proceedings thereafter shall be conducted by an attorney to be designated by the court. Under the present system proceedings are usually commenced by the various bar associations. While theoretically any private citizen may commence such proceedings, action by any other than a regularly constituted body is impracticable. A private citizen himself has not the knowledge, the time, nor the inclination to commence disbarment proceedings. Individual attorneys will not commence such proceedings at the instigation of a private individual because of their natural disinclination to proceed against another attorney, and also because of the existence of a certain professional code and spirit which deters one lawyer from proceeding against another.

The present method of proceedings instituted by bar associations has proven inefficient and ineffectual. Very few proceedings are commenced, and actions which are commenced drag indefinitely.

A change is vitally necessary. Various methods have from time to time been suggested, — reference to the Attorney General; establishment of bar counsel in each county. Neither agency meets the situation. I suggest that a paid commission of three or more attorneys be appointed by the Governor for a term of years, who shall not be permitted to engage in the practice of the law, with duties and powers of investigation and prosecution of cases of "deceit, malpractice or other gross misconduct."

16. Limitation upon Practice in Criminal Cases by Special Justices.

I urge attention to the recommendation, made in former years, that special justices of municipal and district courts be prohibited from practising in their own courts in criminal cases whether as prosecuting officers or as defendants' attorneys. The justice and the clerk or assistant clerk of a court are now prohibited from engagement in any criminal action pending in or previously examined or tried in the court. Special justices as well should be prohibited.

The appearance of special justices as counsel for complainant or defendant in criminal actions pending before their courts arouses in the public mind a certain element of distrust, in that close association of the judges may influence decisions. However unfounded, the practice is detrimental to the confidence of the people in an impartial judicial system.

17. Treatment of Drug Addiction.

A problem that little comes to the attention of the public at large is that relating to the unfortunate drug addict. Today, if he seeks cure, his sole avenue of relief through the agency of this State is a commitment which puts him in the light of a criminal, as many of these unfortunates are without the means to avail themselves of private sanitarium treatment. I suggest, in the cause of humanity, that some legal avenue be opened which will grant them institutional relief apart from criminal process. If by these means it is possible to restore to normal health these unfortunates, the contribution that this element makes to crime is bound to be diminished.

18. Regulation of "Overnight Camps."

"Overnight" camps are springing up all over the State. Aside from regulation for public health by provision for their inspection, and for disposition of waste matter, regulation by licenses to owners, requiring records of lodgers, would afford information for identification of persons. G. L., c. 40, § 21, cl. 1st (enabling towns to enact by-laws relative to the conduct of such business), if availed of by all towns, might be sufficient, but general legislation applicable to all camps may well be considered.

19. Regulation of the Sale of Securities.

By Resolves of 1928, c. 29, the Board of Bank Incorporation and the Department of Public Utilities, acting jointly, were directed to investigate a number of proposals for amendment to the laws regulating the sale of securities. The members of the two departments

under date of December 5, 1928, filed a report, with drafts of suggested legislation attached thereto. The recommendations contained in the report if adopted would cause no radical changes in the substantive law governing the sale of securities, but would unquestionably so organize the Department of Public Utilities that it would be enabled to enforce existing law much more effectively. I believe that the recommendation of the two Boards that a Securities Division be established in the Department of Public Utilities should be adopted. Only by constant supervision and by vigilant inspection can the activities of fraudulent stock dealers and salesmen be curbed. Without a well-trained group of energetic investigators, inspectors and accountants under a director of real executive ability, sound business sense and experience, successful work in checking the losses to the public caused by unscrupulous promoters and stock salesmen may not be expected.

The present Sale of Securities Act, I believe, has never been given a fair test in its present form, for the proper means to enforce it energetically have hitherto never been (and are not now) at the disposal of the Department of Public Utilities. It may well be that the present unhealthy situation with respect to the sale of securities is based on too little and ineffective enforcement rather than on too little legislation.

The suggestion in the Report of the Attorney General for the year ending November 30, 1927 (at pp. 17–21, 29–31), with respect to reforms in the enforcement of the law governing the sale of securities, that the enforcement of these laws be concentrated in the Department of the Attorney General, was rejected by the 1928 General Court, and was not referred for consideration to the recess commission consisting of the Department of Public Utilities and the Board of Bank Incorporation. The Department of the Attorney General has under the present law no duties and virtually no powers with respect to infringements of the Sale of Securities Act, except in cases referred to the Attorney General by the Department of Public Utilities, or in cases where a crime has been committed, which latter group of cases is primarily within the scope of the duties of the several district attorneys. I support the recommendation of the recess commission principally because it has some tendency to centralize the duty of enforcement of these important laws, although I am still inclined to believe that the recommendation will eventually prove to be less satisfactory than the plan of placing the responsibility for the enforcement of these laws in this Department, following the practice adopted in New York most successfully.

Many complaints of losses are received from subscribers to so-called "tipster sheets" or "investment services." The Sale of Securities Act should in explicit language make the sales and distribution of investment services and information subject to the supervision of the Department of Public Utilities. Certainly persons issuing or distributing such services or "tipster sheets" should be required to register as brokers under G. L., c. 110A, and the Department of Public Utilities should have power to revoke the registration of such persons for cause.

CONCLUSION.

The foregoing report does not, and, indeed, cannot, cover in detail all the multifold and various activities of this Department which seldom come to the public attention, save such as may be featured in the press and so become of popular interest. Service in all the courts of the Commonwealth and in the Federal courts, rendition of advice to the executive and legislative branches of government and to the departments and their subordinate divisions is routine, but, nevertheless, often attended with major consequences to every man, woman and child in the Commonwealth.

Respectfully submitted,

JOSEPH E. WARNER,
Attorney General.